(1)

Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

ANDREW KIEFFER,

Petitioner,

v.

NANCY KIEFFER and FIRSTAR BANK, N.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where Andrew Kiefer filed a Petition in St. Louis County, Missouri Circuit Court originally requesting a stock account and certificates of deposit (which later became one combined account with Firstar Bank, Interpleader and Third Party Defendant) to be divided equally with his daughter Nancy Kiefer (named as a Defendant) pursuant to the belief that she had a legitimate interest in the aforesaid stock and certificates of deposit when later said interest was learned to not be legal and the State Circuit Court and Appellate Courts still enforced a Settlement Agreement despite recognized standards of due process pursuant to the Fourteenth Amendment of the United States Constitution with in part the awarding of indemnification from actions by the Internal Revenue Service in the Order of the Trial Court:

Did the St. Louis County, Missouri Circuit Court, the Missouri Court Of Appeals, Eastern District, and the Missouri Supreme Court err by refusing to hear evidence or supplement the Record On Appeal with evidence pursuant to established principles of Judicial Notice and correspondingly established principles of Procedural Due Process when a disputed Settlement Agreement was enforced against Andrew Kiefer with in part indemnity ordered against Andrew Kiefer for any possible action by the Internal Revenue Service?

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Andrew Kieffer petitions for a writ of certiorari to review the Judgment of the St. Louis County, Missouri Circuit Court, the affirming of the Judgment by the Missouri Court Of Appeals, Eastern District, and the denial of an Application To Transfer to the Missouri Supreme Court filed on May 28, 2003 by the Missouri Supreme Court.

OPINIONS BELOW

The opinion of the Missouri Court Of Appeals, Eastern District affirming the Circuit Court was entered on January 28. 2003 and is reprinted in the appendix to this petition. App. 1a-11a. The Missouri Supreme Court denied a timely filed Application To Transfer with an Order entered on May 28, 2003 which is reprinted in the appendix to this petition. App. 20a-21a.

The Judgment of the St. Louis County, Missouri Circuit Court entered on October 1, 2001 which ordered: (1) the granting of a Motion To Enforce Settlement Agreement; (2) the payment of ½ the assets deposited in an account with Firstar Bank to Respondent Nancy Kieffer; (3) the awarding of 1/2 the stock accounts primarily with A.G. Edwards & Sons to Respondent Nancy Kieffer; (4) the awarding of $65,000.00 to Respondent Nancy Kieffer for services rendered to her Great Uncle Lucas Bles to be paid by Andrew Kieffer from the assets deposited with Firstar Bank; (5) indemnification of the parties in regard to tax liability (specifically instructing Andrew Kieffer to hold harmless and indemnify Respondent Nancy Kieffer) from possible actions by the Internal Revenue Service; (6) the distribution of several items of personal property; (7) the awarding of attorneys fees to Respondent Nancy Kieffer; and (8) the

dismissal with prejudice of all parties' claims. A copy of the Circuit Court decision is reprinted in the appendix attached to this petition. App. 12a-19a.

STATEMENT OF JURISDICTION

The Supreme Court Of Missouri filed its order on May 28, 2003 denying a timely filed Application To Transfer To The Missouri Supreme Court from the Missouri Court Of Appeals, Eastern District. This Court has Jurisdiction to review the Order of the Missouri Court Of Appeals, Eastern District, affirming the Judgment of the Circuit Court, the Judgment of the Circuit Court, and correspondingly this Court has Jurisdiction to review the aforementioned Order of the Missouri Supreme Court under 28 U.S.C. § 1257(a).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Statutes at issue are 26 U.S.C. § 6201(a) and 26 U.S.C. § 6404(a). and said Statutes are reprinted in the appendix to this petition. App. 22a-23a. Missouri Rule of Civil Procedure 52.04 Sections (a) and (b) is also at issue and is reprinted in the appendix to this petition. App. 25a. Further, at issue is the Fourteenth Amendment of the United States Constitution, Section 1, which is reprinted in the appendix to this petition. App. 26a.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves Petitioner Andrew Kieffer contending violations of Due Process under the Fourteenth Amendment of the United States Constitution pursuant to the Order of the Trial Court which enforced a disputed Settlement Agreement. App. 12a-19a. Additionally, the Petitioner Andrew Kieffer contends violations of Due Process by the Order of the Appellate Court which affirmed the Trial Court. App. 1a-11a. Further, Petitioner Andrew Kieffer contends that the denial of a Motion which would have supplemented the Record On Appeal is a denial of Due Process.

Respondent Nancy Kieffer is the Petitioner Andrew Kieffer's daughter. Lucas Bles was the uncle of Andrew Kieffer and the great uncle to Nancy Kieffer. Lucas Bles died in January 1997 and Respondent Nancy Kieffer has claimed she was entitled to joint ownership in stock accounts which are invested primarily through A.G. Edwards & Sons and funds presently deposited with Firstar Bank which is also a party in the litigation as a Third Party Defendant and Interpleader. Andrew Kieffer filed a multi-count Petition in the St. Louis County, Missouri Circuit Court, after the death of Lucas Bles, in part seeking partition of the stock accounts and funds deposited with Firstar Bank. This was done upon the belief by Andrew Kieffer that his daughter Nancy Kieffer had a legitimate joint interest in the stock accounts and funds deposited with Firstar Bank. Said belief was based upon the word of his daughter, despite Andrew Kieffer never seeing any granting of the joint interest to Nancy Kieffer in a valid writing. Nancy Kieffer filed Counterclaims in part seeking ownership and control of the stock accounts and assets now

deposited with Firstar Bank. Nancy Kieffer also sought payment for supposedly working for Lucas Bles shortly before his death.

There is no dispute that before the death of Lucas Bles the Petitioner Andrew Kieffer was awarded a ½ joint interest in the stock accounts (invested primarily through A.G. Edwards & Sons) and the assets now deposited with Firstar Bank. A gift by Lucas Bles during his lifetime to Andrew Kieffer of ½ of the stock accounts and funds now deposited in Firstar Bank is not disputed. As the litigation progressed documents came to light that an attorney named Irwin M. Roitman had tried to marry the Respondent Nancy Kieffer in November 1995. A copy of the application for marriage between Nancy Kieffer and Mr. Roitman was discovered by the family of Andrew Kieffer. Mr. Roitman was also the attorney who drafted the Last Will And Testament for Lucas Bles as well as at least one durable power of attorney making Nancy Kieffer the attorney in-fact for Lucas Bles before he died. Another durable power of attorney made Andrew Kieffer the attorney-in-fact and Nancy Kieffer the successor attorney-in-fact. for Lucas Bles. These documents were not considered by the Trial Court at any evidentiary hearing or trial on the merits since Judgment was entered and a Settlement Agreement was enforced. App. 12a-19a. Petitioner Andrew Kieffer contended that no such Settlement Agreement was entered into by the parties. Also, a document showing Respondent Nancy Kieffer worked for Kelly Temporary Services while supposedly working exclusively for Lucas Bles was not allowed to be considered by the Trial Court by not having an evidentiary hearing on the merits of the case. The position of the Petitioner Andrew Kieffer is that the Defendant Nancy Kieffer at no time was ever entitled to a joint interest in the stock accounts (invested primarily

with A.G. Edwards & Sons)or funds now deposited with Firstar Bank which included $65,000.00 in funds to pay for services supposedly rendered to Lucas Bles.

On October 1, 2001 the Trial Court entered a Judgment which enforced a disputed Settlement Agreement and in part ordered Andrew Kieffer to pay ½ of the funds deposited with Firstar Bank and the stock accounts to Nancy Kieffer. Additionally, ordered was that Andrew Kieffer was to pay $65,000.00 from his share of the funds deposited with Firstar Bank to Nancy Kieffer for the work she claimed to have done for Lucas Bles. The Trial Court also in part ordered Petitioner Andrew Kieffer to indemnify Nancy Kieffer from tax liability if the Internal Revenue Service claims that Nancy Kieffer owes incomes taxes from the lawsuit or has any liability resulting from the federal estate tax returns of Lucas Bles. App. 12a-19a. Petitioner Andrew Kieffer contends Due Process was denied by the Trial Court since no evidentiary hearing took place on the merits where proper documents and testimony could have been allowed. Tax liability and indemnification was forced on the Petitioner Andrew Kieffer without any determination by the Internal Revenue Service, and the Marital Property Interest of the Plaintiff Andrew Kieffer and Lucille Kieffer was not properly addressed. App. 12-19a.

Petitioner Andrew Kieffer also contends that the Appellate Court denied Due Process since it affirmed the Trial Court's Judgment on the same grounds held by the Trial Court. App. 1a-11a. Further, Petitioner Andrew Kieffer contends the Appellate Court denied Due Process by not taking Judicial Notice of documents that showed the Respondent Nancy Kieffer was not entitled to any Judgment or enforcement of Settlement Agreement. The grounds for

requesting this Court's involvement are pursuant to the rulings of the Missouri Courts rendering Judgment and orders in this case which affect Due Process under the Fourteenth Amendment of the United States Constitution.

PROCEDURAL HISTORY

In January 1997 Lucas Bles died. The executor of his estate was Andrew Kieffer. The attorney who drafted the Last Will and Testament for Lucas Bles was Irwin M. Roitman. Nancy Kieffer never was allowed a valid claim upon the estate for any of the assets or property involved in the instant litigation. Some time after the probating of the Estate of Lucas Bles the Petitioner Andrew Kieffer filed his lawsuit which lead to the Judgment entered by the Trial Court on October 1, 2001 to enforce the disputed Settlement Agreement between the parties. App. 12a-19a. The Appellate Court affirmed the Judgment of the Circuit Court on January 28, 2003. App. 1a-11a. A motion by Andrew Kieffer to supplement the record was denied by the Appellate Court on March 4, 2003. Correspondingly, a timely Motion For Rehearing and/or Application For Transfer To The Missouri Supreme Court was denied by the Appellate Court on April 2, 2003. Finally, the Missouri Supreme Court denied a timely Application To Transfer The Case on May 28, 2003. App. 20a-21a.

REASONS FOR GRANTING THE PETITION

I. If Not Reversed By This Honorable Court The Missouri Supreme Court Orders, Missouri Court Of Appeals, Eastern District Affirming Of Judgment, And The St. Louis County, Missouri Circuit Court Entering Of Judgment Will Be Allowed To Deny A Property Interest Recognized Under The Fourteenth Amendment Of The United States Constitution Which Presents A Federal Question Pursuant To The Erroneous Decisions Of The Aforesaid Missouri Courts Which Includes In Part The Erroneous Awarding Of Indemnification From Possible Internal Revenue Service Decisions

A. Legal Standard With Corresponding Points

The Fourteenth Amendment of the United States Constitution does not allow any State to deprive any person of life, liberty or property without due process of law. App. 26a. Here, the property interest of Petitioner Andrew Kieffer was deprived without due process by the Trial Court when stock accounts primarily with A.G. Edwards & Sons and assets deposited with Firstar Bank were effectively split with Respondent Nancy Kieffer who had no right to the stocks or assets deposited with Firstar Bank App.12a-19a. Also, the Trial Court ordering the Petitioner Andrew Kieffer to pay an additional $65,000.00 from the funds deposited with Firstar Bank is another deprivation of the property owned by the Petitioner Andrew Kieffer without due process of law. App. 12a-19a. Further, the indemnification of Respondent Nancy Kieffer from taxes or tax liability related to any actions filed by the Internal Revenue Service is a denial of due

process since it deprives Petitioner Andrew Kieffer of any chance to defend himself or protect his property interest. App. 12a-19a. This Court held in *Richards v. Jefferson County Alabama*, 517 U.S. 793, 797 (1997) "the opportunity to be heard is an essential requisite of due process of law in judicial proceedings." This opportunity to be heard would include the right to have all valid evidence heard before a disputed settlement agreement is enforced by a Judgment. Besides the above referenced due process violations the Trial Court ignoring the Joint Marital Rights of Andrew Kieffer and his wife Lucille Kieffer is a deprivation of a property interest without due process of law. Missouri Appellate Courts have long held that "the owner's intent to convert the property to marital property is the determining factor." *D.K.H. v. L.R.G.*, 102 S.W.3d 93, 100 (Mo. App. W.D. 2003). No such intent was considered by the Trial Court since no accurate reference of marital property is made in the October 1, 2001 Judgment. App. 12a-19a. Also, under Missouri Rule Of Civil Procedure 52.04 an indispensable party must be joined by the Trial Court. App. 24a. This can be done at any stage of the litigation including while on appeal. *Mayberry v. City Of Rolla*, 970 S.W.2d 901, 909 (Mo. App. S.D. 1998).

In *Schuykill Trust Co. v. Commonwealth Of Pennsylvania*, 296 U.S. 113, 122 (1935) this Court held "Whether the point was raised in the court below is itself a federal question, and we are bound to examine the record to resolve it." At the very least the record shows the Trial Court in Paragraph 5 of its Judgment made rulings on the tax liability of Andrew Kieffer. App. 16a. The Trial Court stated that Nancy Kieffer would be indemnified by Andrew Kieffer for any income taxes claimed by the Internal Revenue Service. App. 16a The Trial Court also stated that Andrew

Kieffer shall indemnify Nancy Kieffer from any liability on the Federal Estate tax return of Lucas Bles. App. 16a. The record shows this is a Federal Question that the Trial Court erroneously decided with the enforcement of a disputed State Court settlement. 26 U.S.C. § 6201(a) states in part that the Secretary is authorized and required to make inquiries, determinations, and assessments of all taxes. App. 22a. This means the Internal Revenue Service is the authority to define and assess tax liability, not the State Courts of Missouri. 26 U.S.C. § 6404(a) states in part that the Secretary is authorized to abate the unpaid portion of the assessment of any tax or any liability. App.23a. This means the Internal Revenue Service is the authority to abate tax or corresponding liability, not the State Courts of Missouri.

Here, the affirming by the Appellate Court is a violation of due process for the same reasons applied to the ruling of the Trial Court. App. 12a-19a. Additionally, the denial of allowing to supplement the record on appeal was correspondingly a denial of due process. In *Smitty's Super Markets Inc. v. Retail Store Employees Local 322*, 637 S.W.2d 148, 151 (Mo. App. S.D. 1982) the Appellate Court stated that within certain exceptions Judicial Notice can be taken of certain facts and evidence which includes some events occurring after the appeal is taken. These exceptions should have been applied or expanded by the Appellate Court in the instant matter since at the very least an Application For License To Marry filed with St. Louis County Recorder Of Deeds and a voided Marriage License between attorney Irwin M. Roitman and Respondent Nancy Kiefer should have been supplemented to the Record On Appeal. A General Durable Power appointing Petitioner Andrew Kieffer as attorney-in-fact for Lucas Bles while also appointing Respondent Nancy Kieffer a successor in fact should have been supplemented

to the Record On Appeal. Further, letters and documents sent or authored by attorney Irwin M. Roitman related to the estate and financial or stock holdings of Lucas Bles should have been supplemented to the Record On Appeal. Also, payroll records from Kelly Temporary Services for Respondent Nancy Kieffer show that the Appellate Court could have easily determined that Nancy Kieffer was not entitled to an award of $65,000.00 for working exclusively for Lucas Bles. The payroll records are tax records and should have been supplemented to the Record On Appeal. This is a denial of due process since as stated above this Court held in *Richards v. Jefferson County Alabama*, 517 U.S. 793, 797 (1997) "the opportunity to be heard is an essential requisite of due process of law in judicial proceedings". This is equally true for the entire file of documents that should have supplemented to the Record On Appeal. To reiterate the Trial denied any evidentiary hearing on the merits by enforcing the disputed Settlement Agreement. App. 12a-19a. Also, the awarding of attorneys fees violated due process.

B. Due Process Supported By Supreme Court Precedent

Here, 26 U.S.C. § 6201(a) states the Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes including interest additional amounts, additions to the tax, and assessable penalties, not the State Courts of Missouri. App. 22a. 26 U.S.C. § 6404(a) states the Secretary is authorized to abate the unpaid portion of the assessment of any tax or any liability, not the State Courts of Missouri. App. 23a. The Trial Court awarded the tax liability related to the Settlement Agreement in part to Petitioner Andrew Kieffer by unilaterally indemnifying the Respondent Nancy Kieffer.

App. 12a-19a. The decision of the Trial Court was affirmed by the Appellate Court. App. 1a-11a. Then the Missouri Supreme Court denied an Application To Transfer. App. 20a-21a. The taxation of a party should be left up to the Internal Revenue Service, not the Courts of Missouri.

This Court held in *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 386-387 (1986) that a State Supreme Court decision upholding a State Statute pre-empting Federal Law was appealable for review. By analogy the record in the Trial Court decision is clear that the taxation power of the Internal Revenue Service was pre-empted. This Court also held in *Commissioner Of Internal Revenue v. Bosch*, 387 U.S. 456, 457 (1967) "that where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by that determination made of such interest by a State Trial Court." Here, the Trial Court in part determined that Andrew Kieffer would hold harmless and indemnify Nancy Kieffer from any liability (including any attorney's fees incurred by her) on Lucas Bles' federal and estate tax returns. App 12a-19a. This violates the authority of the federal statutes already cited and is also in direct contradiction with the *Bosch* decision. App 12a-19a. This qualifies as a violation of due process since no Internal Revenue Services officials were involved, despite the affirming of the Trial Court by the Appellate Court. App. 1a-11a. Also, not allowing the record on appeal to be supplemented was a violation of due process since the documents were public documents that in part were prepared by attorney Irwin M. Roitman who is romantically involved with Respondent Nancy Kieffer. As explained by this Court in *Richards v. Jefferson County Alabama*, 517 U.S. 793, 804 (1996) "While it is for the state courts to determine

the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law."

Here, the joint property interest of Lucille Kieffer was not considered by the Trial Court. As stated above Missouri Appellate Courts have long held that "the owner's intent to convert the property to marital property is the determining factor." *D.K.H. v. L.R.G.*, 102 S.W.3d 93, 100 (Mo. App. W.D. 2003). No such intent was considered by the Trial Court since no reference of marital property is made in the October 1, 2001 Judgment. App. 12a-19a. This is another violation of due process since Andrew Kieffer received no opportunity by the Trial Court (App. 12a-19a) or the Appellate Court (App. 1a-11a) to be heard in determining how the property interest of his spouse Lucille Kieffer should have affected the Judgment and disputed Settlement Agreement. In *Richards v. Jefferson County Alabama*, 517 U.S. 793, 797 (1996) this Court stated:

> And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard.

Id. at 797.

There are numerous violations of due process since the decisions of the Missouri Courts have deprived the property interests of Andrew Kieffer who is an elderly man in his eighties. The rulings of the Missouri Courts should be reversed.

C. Non-Federal Grounds Inadequate To Ignore Federal Question

In *Howlett v. Rose*, 496 U.S. 356, 365 (1990) this Honorable Supreme Court held:

> Whether the constitutional rights asserted by petitioner were given due recognition by the [Court of Appeal] as a question as to which the [petitioner is] entitled to invoke our judgment, and this [he has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support.

Here, the Trial Court and the Appellate Court denied due process pursuant to the grounds already expressed in this Petition. The Trial Court awarded the Respondent Nancy Kieffer a ½ interest in assets deposited with Firstar Bank and then awarded $65,000.00 from the same assets for supposed services rendered to Lucas Bles. Yet, no claim was ever made with the Estate of Lucas Bles. Also, tax payroll records not allowed by the Appellate Court to supplement the record showed Respondent Nancy Kieffer did not work exclusively for Lucas Bles. Further, the Trial Court unilaterally decided to award ½ of the stock accounts primarily held through A.G. Edward & Sons to Respondent Nancy Kieffer. To reiterate the tax liability related to the Judgment was unilaterally determined by the Trial Court without involvement of the Internal Revenue Service. App. 12a-19a. All this was done pursuant to Missouri State

Law which supposedly allowed the enforcement of a disputed Settlement Agreement without an adequate evidentiary hearing.

The nonfederal grounds put forward for the Judgment and the Settlement Agreement were not justified pursuant to any fair and substantial support as required by this Honorable Court *Howlett v. Rose*, 496 U.S. 356, 365 (1990). The Judgment was not supported by even Missouri Law and should not have been used to justify the denial of due process under the Fourteenth Amendment. App. 25a. *Howlett v. Rose*, 496 U.S. 356, 365 (1990):

For the foregoing reasons the Petition for a Writ of Certiorari should be granted and upon taking the case (with Briefing and Oral Argument) the Judgment of the Circuit Court, the Order of the Appellate Court affirming the Circuit Court, and the Order of the Missouri Supreme Court should all be reversed and/or vacated by this Honorable Court.

CONCLUSION

Unequivocally, the State Law decisions of the St. Louis County, Missouri Circuit Court, the Missouri Court Of Appeals, Eastern District, and the Missouri Supreme Court if allowed to stand will circumvent the pursuit of Due Process under the Fourteenth Amendment of the United States Constitution. Thus, for the foregoing reasons the Petition for a Writ of Certiorari should be granted and upon taking the case (with Briefing and Oral Argument) the Judgment of the Circuit Court, Order of the Appellate Court, and the Order of the Missouri Supreme Court should all be reversed and/or vacated by this Honorable Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM SUPPLEMENTING ORDER AND ORDER OF THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT DATED JANUARY 28, 2003

IN THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION ONE

No. ED 80592

ANDREW KIEFFER,

Plaintiff/Appellant,

vs.

NANCY KIEFFER,

Defendant/Third-Party Plaintiff/ Respondent,

and

FIRSTAR BANK, N.A.,

Third-Party Defendant/ Respondent.

Appeal from the Circuit Court of St. Louis County

Honorable Bernhardt C. Drumm, Jr.

Appendix A

OPINION FILED:

January 28, 2003

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

Andrew Kieffer (Plaintiff) appeals from the trial court's judgment in favor of Nancy Kieffer (Defendant) to enforce an oral settlement agreement. Because we find no trial court error, we affirm.

Defendant is Plaintiff's daughter. Defendant lived with and cared for her great-uncle, Plaintiff's uncle, during the last years of his life. After his death, Plaintiff filed a petition against Defendant requesting a stock account and certificates of deposit (CD) held jointly by Plaintiff and Defendant be divided equally. The petition also requested reimbursement for taxes paid by Plaintiff and alleged undue influence by Defendant. Defendant filed an answer and a seven-count counterclaim including claims for conversion, punitive damages for conversion, breach of contract, promissory estoppel, fraud, punitive damages for fraud, and undue influence by Plaintiff. In her breach of contract count, Defendant alleged she wanted to move out of her great-uncle's residence and resume her life. Defendant alleged Plaintiff requested that she continue to reside with her great-uncle and care for his needs, and Plaintiff agreed Defendant would be entitled to all of the brokerage accounts and CDs held in joint names after the uncle died.

Appendix A

Plaintiff and Defendant entered into settlement negotiations on April 2, 2001. Plaintiff and Defendant reached a settlement agreement. Plaintiff prepared and filed a memorandum passing the matter for settlement and continuing the case for thirty days pending the filing of a settlement agreement. Defendant sent a draft of the settlement agreement to Plaintiff stating that the CDs were to be divided equally, and Plaintiff would then pay Defendant $65,000.00 from his share. Plaintiff came back with a different offer in which he proposed to divide the CDs equally. Defendant rejected the proposed revision and filed a motion to enforce settlement. Thereafter, on June 15, 2001, Defendant filed an amended motion to enforce settlement and attached a copy of the settlement agreement.

During the proceedings of the case, Plaintiff consolidated the three CDs held by Firstar Bank into one account which was titled an "escrow account." Plaintiff redeemed one CD for $26,238.78 on May 4, 2001. On June 8, 2001, Plaintiff redeemed a second CD for $18,356.73 and a third CD for $93,881.23, putting all the money into an account in his name and his wife's name. Plaintiff accomplished this by misleading Firstar in advising that the CDs were lost. On June 12, 2001, Defendant filed a petition for a temporary restraining order against Plaintiff concerning the funds and filed a third-party petition against Firstar Bank. On June 22, 2001, Firstar Bank filed its answer and a counterclaim for interpleader. On July 23, 2001, Plaintiff filed his answer to Firstar's petition for interpleader with a cross-claim against Firstar Bank. The trial court denied Plaintiff leave to file his answer and cross-claim.

Appendix A

On October 1, 2001, the trial court entered its judgment sustaining Defendant's motion to enforce settlement finding an oral agreement for settlement based on the April 2, 2001 negotiations. This appeal follows.

In his first point, Plaintiff argues the trial court erred in holding there was an oral contract of settlement because the law requires a written contract signed by both parties when the intention of the parties for the contractual relationship is to be governed by a written contract. Plaintiff claims the parties expressed a clear intent that their contractual relationship regarding the settlement should be governed by a written, signed contract. We disagree.

In reviewing a court-tried case, we will affirm the judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

Where there is an intent by the parties not to be bound by an oral contract but only by a later prepared and signed written contract, such intention must be specifically understood in the original agreement. *Hunt v. Dallmeyer*, 517 S.W.2d 720, 724 (Mo. App. 1974). The mere fact parties contemplate a formal written draft of their agreement at a later time is not sufficient in itself to demonstrate that they did not intend to be bound at the time of their original agreement. *Id.*

Appendix A

Here, the evidence supports the trial court's finding an oral settlement agreement. There was no evidence that the parties only intended to be bound by a written contract. All parties treated the negotiations as being final. The written settlement agreement sent to Plaintiff was a memorial of the earlier oral agreement. The trial court did not err in finding an oral settlement agreement. Point denied.

In his second point, Plaintiff asserts the trial court erred in finding an oral contract of settlement because the Statute of Frauds requires an agreement to answer for the debts of another to be in writing and signed by the party to be bound. Plaintiff contends the settlement agreement was an agreement by Plaintiff to pay for the debts of his uncle, and therefore, the agreement needed to be in writing and signed by Plaintiff. We disagree.

We review the trial court's judgment to determine if it is supported by substantial evidence, it is not against the weight of the evidence, or it does not erroneously declare or apply the law. *Murphy*, 536 S.W.2d at 32.

Section 432.010 requires an agreement to answer for the debt of another to be in writing and signed by the party to be charged. Plaintiff contends the intended effect of the settlement agreement was for Plaintiff to answer for the debt of his uncle. The evidence, however, does not support Plaintiff's claim. There was no evidence that a third party, the uncle, was indebted to Defendant. Defendant did not have a claim against the uncle or his estate. The Statute of Frauds does not apply. The trial court did not err in finding an oral settlement agreement. Point denied.

In his third point, Plaintiff argues, as an alternative point, the trial court erred in failing to make specific findings of fact on the issue whether the agreement was one to answer for the debt of another. Plaintiff contends the trial court was required to make a specific finding on the issue as requested by Plaintiff, and the failure of trial court to make a specific finding mandates reversal. We disagree.

While the failure of a trial court to make specific findings of fact as requested by counsel is error, it does not always requires reversal. *Lattier v. Lattier*, 857 S.W.2d 548, 549 (Mo. App. E.D. 1993). A reversal is required when the failure to make the finding as requested materially affects the merit of the action or interferes with appellate review. *Id.* Moreover, if the record is sufficient to support the trial court's judgment, we will affirm. *Altmann v. Altmann*, 978 S.W.2d 356, 363 (Mo. App. E.D. 1998).

Here, although the trial court failed to make a specific finding on whether the agreement was one to answer for the debt of another, its failure does not interfere with our review or materially affect the merit of the action. Moreover, the record is sufficient to support the trial court's judgment finding an oral settlement agreement. Point denied.

In his fourth point, Plaintiff contends the trial court erred in its award to Defendant on the oral settlement contract. Plaintiff contends Defendant was to recover only on the contract pleaded, and the trial court's settlement agreement went beyond the contract Defendant based her claim for recovery on. We disagree.

Appendix A

The amount discussed during the settlement negotiations was based on the balance of the CDs as of March 19, 2001. On March 30, 2001, interest was added to the balance of the CDs. In its judgment, the trial court decided that each party would receive one-half of the CDs based on the amount on April 2, 2001, and then Plaintiff would pay Defendant $65,000.00 from his share. There was testimony to support the trial court's judgment. At the hearing to enforce the settlement agreement, evidence was presented as to the amounts of the CDs, which support the trial court's judgment.

Plaintiff also asserts the trial court added provisions that were not in the original settlement agreement, including a provision that Defendant is not to enter the premises of her siblings without permission. Plaintiff testified that there was some discussion about the siblings and he stated, "I think it was my family that agreed with that, that they wanted protection." Plaintiff later stated he did not recall whether he requested that it be included or that his son requested it. Regardless, the provision was for the benefit of Plaintiff. We find no error. The other provision Plaintiff complains of was a provision that there would be no further contact between Plaintiff and Defendant. Again, we find no error with this provision. Point denied.

In his fifth point, Plaintiff argues the trial court erred in awarding attorney's fees to Defendant. Plaintiff maintains that under the American Rule each party is to pay his or her own attorney's fees, and this case does not fall within any of the specified exceptions. We disagree.

Appendix A

In its judgment, the trial court awarded Defendant $8,262.50 for attorney's fees. Missouri courts have historically adhered to the "American Rule" in that, absent statutory authorization or contractual agreement, with few exceptions, litigants bear the expense of their own attorney's fees. *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151, 156 (Mo. App. E.D. 2000). One exception is when a court of equity finds it necessary to award attorney's fees in order to balance benefits, but this only occurs if "very unusual circumstances" can be shown. *Id.* Another exception is "special circum-stances," which is a narrow exception and must be strictly construed. *Id.* Among the scenarios where "very unusual" or "special" circumstances have been shown include intentional misconduct by a party. *Id.*; *See Temple Stephens Co. v. Westenhaver*, 776 S.W.2d 438, 443 (Mo. App. W.D. 1989).

Although no statutory or contractual grounds warrant awarding attorney's fees, here, we find there was intentional misconduct by Plaintiff. In Plaintiff's testimony, he indicated that he redeemed the CDs and put them in an escrow account with his name only payable on death to his wife, to get the money out of the jurisdiction. Plaintiff stated he was trying to reverse a quick decision of forced settlement. Furthermore, the timing of Plaintiff's actions indicate his intent to defy the court. Plaintiff redeemed the first CD after the parties passed the case for settlement for an additional twenty days and redeemed the second and third CDs after Plaintiff requested a continuance on the hearing to enforce the settlement. Because of Plaintiff's actions, Defendant then had to file numerous pleadings, including temporary restraining orders and orders to show cause. Because of

Plaintiff's intentional misconduct, this case qualified as a "special" or "very unusual" circumstance so as to justify the trial court's award of attorney's fees. Moreover, we find no abuse of discretion in awarding attorney's fees. *See DCW Enterprises, Inc. v. Terre du Lac Ass'n, Inc.*, 953 S.W.2d 127, 132-33 (Mo. App. E.D. 1997). Point denied.

In his sixth and final point, Plaintiff contends the trial court erred in rejecting Plaintiff's answer and cross-claim to Firstar Bank's petition to intervene. Plaintiff argues the trial court had no discretion to reject his petition because his petition was timely and properly filed under the rules of procedure. However, any error in rejecting Plaintiff's petition was harmless. Plaintiff was not entitled to recover his attorney's fees and litigation expenses from Firstar Bank. Furthermore, the trial court's judgment disposed of and distributed all of the funds interpled by Firstar Bank. Thus, Plaintiff's claim that he was properly (sic) denied the right to file an answer to Firstar Bank's Interpleader is moot. Point denied.

Judgment of the trial court is affirmed.

Appendix A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION ONE

No. ED 80592

ANDREW KIEFFER,

Plaintiff/Appellant,

vs.

NANCY KIEFFER,

Defendant/Third-Party Plaintiff/
Respondent,

and

FIRSTAR BANK, N.A.,

Third-Party Defendant/
Respondent.

Appeal from the Circuit Court
of St. Louis County

Honorable Bernhardt C. Drumm, Jr.

OPINION FILED:

January 28, 2003

Appendix A

Before Robert G. Dowd, Jr., P.J., and Mary K. Hoff and George W. Draper III, JJ.

ORDER

PER CURIAM.

Andrew Kieffer appeals from the trial court's judgment in favor of Nancy Kieffer to enforce an oral settlement agreement.

We have reviewed the briefs of the parties and the record on appeal and find the claims of error to be without merit. An opinion reciting the detailed facts and restating principles of law would have no precedential value. The parties have been furnished with a memorandum for their information only, setting forth the reasons for this order. The judgment is affirmed in accordance with Rule 84.16(b).

APPENDIX B — JUDGMENT OF THE ST. LOUIS COUNTY, MISSOURI CIRCUIT COURT DIVISION 4 DATED AND FILED OCTOBER 1, 2001

STATE OF MISSOURI)
) ss.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 99CC-2755

Division No. 4

ANDREW KIEFFER,

Plaintiff

vs.

NANCY KIEFFER,

Defendant
Third-Party Plaintiff

vs.

FIRSTAR BANK, N.A.,

Third-Party Defendant

Appendix B

JUDGMENT

This matter is before the Court on the Amended Motion of Defendant Nancy Kieffer to Enforce Settlement. The Motion was heard on June 29, 2001 and evidence was adduced. Because there were concerns expressed about the Plaintiff's health, the parties were permitted to take Plaintiff's deposition and submit same to the Court as Plaintiff's testimony on the Amended Motion to Enforce Settlement. Otherwise, the parties were foreclosed by the Court from presenting additional evidence. On July 24, Andrew Kieffer's deposition was filed. Since the date that the parties filed a passed for settlement memorandum (April 3, 2001) numerous papers have been filed by Plaintiff and others on behalf of Plaintiff. Those papers are not evidentiary and have not been taken into consideration by the Court in reaching its decision on the within Motion. Based on the evidence adduced, the Court concludes that the parties settled their dispute on April 2, 2001 and that the written settlement agreement submitted to Plaintiff by Defendant Nancy Kieffer in substance embodied the Settlement Agreement of the parties. Paragraph 1 of the Agreement, while objected to in form, correctly stated the substance of the Agreement. Paragraph 13 failed to include the other members of the family and should be modified to express the Settlement Agreement of the parties. The Settlement Agreement constitutes the basis for the within Judgment and is modified to fully express the oral agreement of the parties of April 2, 2001 and to take into consideration the action taken by Plaintiff closing accounts #0055159660, #0055159665 and #0055159667 at Firstar Bank and depositing those funds into account #4347220701 at Firstar Bank.

Appendix B

Based on the evidence, it is clear to the Court, and the Court so finds, that Plaintiff changed his mind after agreeing to the Settlement on April 2, and that the proceedings in this cause since April 2 have been occasioned by Plaintiff and others purporting to act in his behalf. Although Plaintiff was unresponsive, evasive, beligerent, combative and argumentative and failed and refused on countless occasions, to answer direct questions propounded to him at his deposition, the Court concludes that he had, in fact, on April 2, 2001, approved the Settlement embodied in the within Judgment. That conclusion is confirmed by the testimony of David Yates and the other evidence adduced on June 29, 2001. Attorney fees are being awarded against Plaintiff because his actions have necessitated these further proceedings. Accordingly, the Motion to Enforce Settlement is granted.

It is therefore Ordered, Adjudged and Decreed that:

1. Subsequent to settlement, certificates of deposit #005515965, #0055159666 #005515967 at Firstar Bank (formerly Mercantile) were transferred by Plaintiff to account #4347220701. Firstar Bank is ordered to distribute to Defendant Nancy Kieffer from account #4347220701 a sum equal to one half of the total on deposit in the three aforesaid certificates of deposit on April 2, 2001. From the remaining balance, Firstar is ordered to distribute to Defendant Nancy Kieffer the additional sum of $65,000.00. The remaining balance is awarded to Plaintiff but shall be held by Firstar Bank until such time as the attorney fees awarded in paragraph 13 are satisfied by Plaintiff. Upon payment of those attorney fees, Plaintiff shall be entitled to receive such balance.

Appendix B

2. All stocks in the name of Plaintiff Andrew Kieffer and Defendant Nancy Kieffer shall be divided equally between them and the parties shall take appropriate action to so divide such stock.

3. With respect to the stocks held in account #592-065061-005 at A.G. Edwards & Sons, Inc., Defendant Nancy Kieffer paid the Federal and State income taxes on the dividends and interest earned on that account for calendar years 1997, 1998 and 1999. Said Defendant holds harmless and shall indemnify Andrew Kieffer, including attorney's fees incurred by said Defendant, in defending any claim filed against Plaintiff as a result of any alleged liability for the taxes on the A.G. Edwards & Sons, Inc. account for 1997, 1998 and 1999. Each party shall claim on their Federal and State income tax returns for 2000 one-half of the interest and one-half of the dividends.

4. Plaintiff Andrew Kieffer paid Federal and State income taxes on all of the interest earned at Firstar Bank on the certificates of deposit listed in paragraph 1 of this Settlement Agreement for calendar years 1997, 1998 and 1999. Defendant Nancy Kieffer is solely responsible to pay the taxes on the interest earned at Firstar Bank on said certificates of deposit for calendar year 2000. Said Defendant shall hold harmless and indemnify Plaintiff, including attorney's fees incurred by Plaintiff, in defending any claim filed against Plaintiff, as a result of any alleged liability for income taxes on the interest on said accounts for calendar year 2000.

5. Attached to the draft of the Settlement Agreement is an exhibit, "Schedule E Summary of Exclusions" on the estate of Lucas L. Bles. In the event that the Internal Revenue Service and/or Missouri Department of Revenue claims that Defendant Nancy Kieffer owes any income taxes or is liable for Social Security payments or Medicare payments which are ordinarily deducted from a paycheck, then in that event, Plaintiff Andrew Kieffer shall hold harmless and indemnify Defendant Nancy Kieffer from any liability for the taxes (including penalties and interest), Social Security deductions and Medicare deductions, including any attorney's fees that said Defendant might incur in defending, any claim filed by the Internal Revenue Service and/or Missouri Department of Revenue. In addition, Plaintiff shall hold Defendant Nancy Kieffer harmless and indemnify her from any liability (including any attorney's fees incurred by her) on Lucas Bles' federal and state estate tax returns.

6. Plaintiff Andrew Kieffer shall deliver to Defendant Nancy Kieffer the following items:

A. Coin collection and letter appraising the coin collection.

B. Set of antique dishes with people in the center.

C. Compass

D. Nancy's cuisinart.

Items 6(A) through 6(D) shall be delivered to Defendant Nancy Kieffer within 30 days. In addition, if Plaintiff Andrew

Kieffer can locate a crystal goblet set, key holder and German clock, he will turn those items over to her at the same time or when located.

7. By this Judgment and in accordance with the parties' Settlement Agreement, Defendant Nancy Kieffer on behalf of herself, her successors and assigns hereby releases and forever discharges Plaintiff Andrew Kieffer, his agents, servants, representatives, successors and assigns, from each and every claim, cause, demand, action, cause of action, damage, expense, loss, attorney's fee, or liability of any kind whatsoever, whether known or unknown, vested or contingent, whether arising in law or in equity, or otherwise, which Defendant Nancy Kieffer on behalf of herself, her successors and assigns, had, have or may have against Plaintiff Andrew Kieffer which have arisen, arise or may arise out of those facts, events and circumstances alleged or which could have been alleged by Defendant Nancy Kieffer in her Counterclaim in the within cause.

8. By this Judgment and in accordance with the parties' Settlement Agreement, Plaintiff Andrew Kieffer, on behalf of himself, his successors and assigns hereby releases and forever discharges Defendant Nancy Kieffer, her agents, servants, representatives, successors and assigns from each and every claim, cause, demand, action, cause of action, damage, expense, loss, attorney's fee or liability of any kind whatsoever, whether known or unknown, vested or contingent, whether arising in law or in equity, or otherwise, which Plaintiff Andrew Kieffer, on behalf of himself, his successors and assigns, had, have or may have against Defendant Nancy Kieffer which have arisen, arise or may

arise out of those facts, events and circumstances alleged to have occurred as alleged or could have been alleged in Plaintiff's First Amended Petition, including Counts I, II and III thereof in the within cause.

9. (A) Plaintiff Andrew Kieffer shall not enter on the premises wherever Defendant Nancy Kieffer resides without her prior written permission.

(B) Defendant Nancy Kieffer shall not enter on the premises wherever Andrew Kieffer resides without his prior written permission.

(C) Defendant Nancy Kieffer shall not enter on the premises where her siblings, David, Kevin and Carolyn, reside without prior permission.

(D) There shall be no further contact between Plaintiff Andrew Kieffer and Defendant Nancy Kieffer.

10. All parties shall execute any and all documents necessary to effect this Judgment and the terms hereof shall be performed within thirty (30) days hereof.

11. Pursuant to the parties' settlement all Counts of Plaintiff Andrew Kieffer's First Amended Petition against Defendant Nancy Kieffer are dismissed with prejudice.

12. Pursuant to the parties' settlement, all Counts of Defendant Nancy Kieffer's Counterclaim, as Amended, against Plaintiff Andrew Kieffer are dismissed with prejudice.

13. Pursuant to the parties' settlement, this Judgment shall be binding upon and shall inure to the benefit of the parties, their heirs, devises, executors, administrators, successors and assigns.

14. Defendant Nancy Kieffer's attorney, Terry A. Bond, is awarded, and Plaintiff Andrew Kieffer shall pay to Terry A. Bond, the sum and amount of $8,262.50 as and for attorney fees on the Motion to Enforce Settlement.

15. All other matters pending are dismissed as moot.

16. Plaintiff Andrew Kieffer and Defendant Nancy Kieffer shall each pay one-half (1/2) of the Court costs.

SO ORDERED

s/ B. C. Drumm, Jr.
B. C. Drumm, Jr.
Judge, Division 4

Entered this 1st day of October, 2001.

APPENDIX C — ORDER OF THE SUPREME COURT OF MISSOURI DATED MAY 27, 2003 AND FILED MAY 28, 2003

IN THE SUPREME COURT OF MISSOURI

SC85232
ED80592

May Session, 2003

Andrew Kieffer,

Appellant,

vs. (TRANSFER)

Nancy Kieffer and Firstar Bank, N.A.,

Respondents.

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2003, and on the 27th day of May, 2003, in the above-entitled cause.

Appendix C

Given under my hand and seal of said Court, at the City of Jefferson, this 27th day of May, 2003.

s/ [illegible] Clerk

s/ [illegible] D.C.

APPENDIX D — 26 U.S.C. § 6201(a)

UNITED STATES CODE ANNOTATED
TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F—PROCEDURE AND ADMINISTRATION
CHAPTER 63—ASSESSMENT
SUBCHAPTER A—IN GENERAL

§ 6201. Assessment authority

(a) Authority of Secretary.—The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.

* * * *

APPENDIX E — 26 U.S.C. § 6404(a)

UNITED STATES CODE
TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F—PROCEDURE AND ADMINISTRATION
CHAPTER 65—ABATEMENTS, CREDITS, AND REFUNDS
SUBCHAPTER A—PROCEDURE IN GENERAL

§ 6404. Abatements

(a) General rule.—The Secretary is authorized to abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which—

(1) is excessive in amount, or

(2) is assessed after the expiration of the period of limitation properly applicable thereto, or

(3) is erroneously or illegally assessed.

* * * *

APPENDIX F — MISSOURI RULE OF CIVIL PROCEDURE 52.04

52.04. Joinder of Persons Needed for Just Adjudication

(a) Persons to Be Joined if Feasible. A person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in Rule 52.04(a)(1) or Rule 52.04(a)(2) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: (i) to what extent a judgment rendered in the person's absence might be

prejudicial to that person or those already parties; (ii) the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (iii) whether a judgment rendered in the person's absence will be adequate; and (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

* * * *

APPENDIX G — FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, SECTION 1

UNITED STATES CODE CONSTITUTION OF THE UNITED STATES AMENDMENT XIV SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *